Dominion Iron and Steel Company, Limited, and another . . . . . Plaintiffs

AND

Dominion Coal Company, Limited

Defendant

JUDGMENT OF MR. JUSTICE LONGLEY

RB1000027

IN THE SUPREME COURT OF NOVA SCOTIA

Dominion Iron and Steel Company, Limited, and another - - - - Plaintiffs

AND

Dominion Coal Company, Limited

Defendant

JUDGMENT OF MR. JUSTICE LONGLEY

Delivered 16th September, 1907

IN THE SUPREME COURT

BETWEEN

Dominion Iron and Steel Company, Limited

AND

National Trust Company, Limited

Plaintiffs

AND

Dominion Coal Company, Limited

Defendant

REASONS FOR JUDGMENT

Trial of cause

This cause, involving very large interests, was tried before me, without a jury, at a special sitting in July and August last. The trial lasted three weeks. A very great number of witnesses were examined on both sides and an enormous mass of evidence given, including some hundreds of exhibits. I shall endeavor to embody all the leading and essential facts in my findings, in order that, as far as possible, the courts of review may have before them all the matter necessary to the determination of the legal issues without an examination of this great volume of evidence. For brevity, I shall always speak of the Plaintiffs as the "Steel Company," and the Defendants as the "Coal Company."

Incorporation of Coal Co.

1. The Dominion Coal Company was incorporated by the Legislature of Nova Scotia in 1893 and began operations soon after. They acquired a number of coal mines then being worked in Cape Breton County, south of Sydney Harbor, and a large number of coal areas in the vicinity.

Steady mar[illegible]

2. Some years after the Company had been actively at work the leading members or directors of the corporation

reached the conclusion that the establishment of large iron and steel-producing works in the vicinity of their mines would be advantageous as affording a steady market for their output, especially in the winter months when shipment of coal to their chief markets on the St. Lawrence was impossible, and also be profitable as an industrial enterprise.

Steel Co. organized

3. As a consequence, the Dominion Iron and Steel Company, with a large capital, was organized in 1899, incorporated by the Legislature of Nova Scotia, and many of the directors and leading promoters of the Steel Company were also directors and large shareholders of the Coal Company.

Coal tested

4. Before entering upon this new enterprise, the coal of the Dominion Coal Company was carefully analyzed and found suitable for the manufacture of steel—that is, it contained a sufficiently small percentage of sulphur and ash to make it conform to the necessary conditions of iron and steel production.

Mines in operation

5. The Coal Company was at that time operating the pits known as Dominion No. 1, No. 3, No. 4, and No. 5, on what is commonly known as the Phelan seam. They were also operating No. 8 on what is known as the Harbour Seam. It was the coal taken from the Phelan seam that possessed the qualities which meet the requirements of iron production.

Erection of steel works

6. The Steel Company proceeded to erect very large works at Sydney, at the expenditure of many millions of dollars, which began to operate in 1901.

Coal contract of 1899

7. Before beginning work, the Steel Company entered into a contract with the Coal Company for a supply of coal for carrying on its work, which fixed no limit to this supply if the work expanded, and a low price was agreed upon per ton, $1.20.

Lease of Coal Co's property

8. The next step was the practical amalgamation of the two great corporations. The Steel Company in effect took a lease of the Coal Company in 1902, on terms of paying a yearly rental of $1,600,000, and a royalty of 15 cents per ton on all coal mined exceeding 3,500,000 tons.

9. This arrangement continued until 1903, when it was determined between the parties that the lease should terminate and the Coal Company assume full control of its own property and, to obtain a release from this lease, it paid the Steel Company a substantial sum. Cancellation of lease

10. A new agreement was entered into between the two companies on October 20th, 1903, whereby the Coal Company undertook to furnish the Steel Company with all the coal they should require for the various branches of their business as iron and steel producers, at the price of $1.24 per ton, with 4c per ton for the use of cars. But there was a proviso that the Steel Company should not demand more coal than was necessary for the operation of four blast furnaces and the conversion of this product into various forms of steel manufacture. This contract is to be in force as long as the Coal Company's leases from the Government, 1992-2012. Coal contract of 1903

11. It is this contract which is now under consideration and its interpretation in certain clauses is the subject matter of this suit. Issue

12. This contract in its terms makes it clear, I think, that coal for the operating of an iron and steel plant is the basis of the bargain. The coal required is designated in the contract as "freshly mined run-of-mine coal, reasonably free from stone and shale, from such seams then being worked by the Coal Company, as the Steel Company shall designate." It also provides that after four years the Coal Company may supply slack coal, if suitable for use in steel making and for blast furnace coke, and the same clause defines "suitable" in the following words: "The slack coal so supplied when properly washed by the Steel Company shall not contain a percentum of impurities, to wit: ash and sulphur, appreciably greater than the percentum of impurities in the same coal of run-of-mine grade when crushed and washed in the same manner." Basis of contract

Description of coal

13. Provision is also made that the Steel Company shall give three months' notice to the Coal Company of its requirements for coal in each month, in order, no doubt, that the Coal Company should have reasonable opportunity to make its Notice of requirements

plans for meeting such requirements. It also provides that in case of material increase in the requirements a year's notice should be given of such large increase.

Phelan Seam designated

14. After the contract was signed, the Steel Company, which was then in active operation, designated the Phelan seam as the seam from which its coal was to be taken and obtained its coal under the contract, and as the operations of the Steel Company became larger, a greater amount of coal was demanded, and the regular notices were given of the advance requirements and for some time they were met. But, early in 1905, notices were given of a large increase in 1906, owing to the operation of a third blast furnace and these demands the Coal Company found it difficult to meet without curtailing its supply to other customers who were purchasing coal at more remunerative prices.

Increase in requirements

Mines worked in 1903

15. When the contract of October 20, 1903, was signed, the Coal Company was operating its pits, Nos. 1, 2, 3, 4 and 5 on the Phelan seam; No. 7 on the Hub seam, and Nos. 8 and 9 on the Harbour seam; and in 1905, No. 10 on the Emery seam was opened. In order to meet the increasing demands of the Steel Company, the Coal Company proceeded to open up another pit, as they believed, on the Phelan seam. It was located some distance east of the other pits of the Phelan seam, and on the other side of Glace Bay Basin, and was called Dominion No. 6. It began to put out coal about July, 1905, and some of this was sent to the Steel Company.

Opening of No. 6 colliery

Quality of coal for steel making

16. All the coal sent to the Steel Company is subjected every day to analysis by a staff of chemists, because no coal can be used for the making of coke, which absorbs more than 70 per cent. of the whole coal consumed in the enterprise, which contains a percentage of sulphur larger than 2.75 in an unwashed state. This is the limit and constitutes the danger point. Most of the coal supplied, after washing, averages from 1.3 to 1.6 per cent. in sulphur. Eminent experts in steel-making from both Great Britain and the United States, were called, and the substance of their evidence, which was very full and satisfactory, was that in Great Britain iron is made from coke with an average of 1 per cent. of sulphur, though

there is one iron and steel works which uses coal and coke running as high as 1.5 per cent. in sulphur. The American expert said that in the United States, the percentage of sulphur in the coal and coke was a shade below one. Both thought that 1.6 would constitute the danger point, and they explained very clearly the consequences of a higher percentage of sulphur which would make the production of steel and iron commercially impossible. Mr. Jones, the manager of the Steel Company, and Mr. Scott, the chief analyst, fixed the danger limit in the Sydney works at 2.75 for coal unwashed, but most coal supplied was well below this limit. Limits of sulphur

17. When the coal from No. 6 reached the Steel Works, it was found by analysis to contain a much higher degree of sulphur than could be used for the manufacture of steel, and it was rejected by the Steel Company, and in many instances taken back by the Coal Company, and acknowledged by one of the directors of the Coal Company to be unfit for use by the Steel Company. Analysis of coal from No. 6

18. It is fitting that a word should be said also in respect of the pit known as No. 4. The working in the west side of this pit produces excellent coal for iron making, but the working on the east side leads directly towards that part of the seam in which No. 6 is situate. The geologists who were examined said that the workings on the west slope of No. 6, and the workings on the east slope of No. 4, which are now less than three miles apart, will, if continued, meet, that is, they are working towards each other. The coal produced from this east working of No. 4 is also too high in sulphur for iron-making. Description of No. 4 colliery

19. A long correspondence between the managers of the two companies was put in evidence and also some letters between directors of the two companies, the purport of which I shall endeavor to summarize as fairly as possible. The manager of the Steel Company is not infrequently notifying the manager of the Coal Company of the delivery of certain cars of coal which are not suitable for their work, and not in accordance with the contract. These cars were in some instances taken back by the Coal Company and in others declined on the ground they came from other pits than No. 6. In August, Early rejections of coal

Modus vivendi

1905, a sort of modus vivendi was agreed to between the two companies, which may best be found in a letter addressed by Mr. F. P. Jones (then sales agent, but now general manager of the Steel Company,) to Mr. Duggan, manager of the Coal Company, dated August 16th, 1905. He says:

"In order to meet you in every possible way we will agree without prejudice to any of our rights under the contract, and until further notice, to accept seventy-five tons of this coal every day, provided you will have it carded No. 6 coal, so that there will be no chance of our getting it mixed in with the coal we use in our coke ovens and gas producers."

This was agreed to by the Coal Company without prejudice to its rights under the contract.

Various uses of coal

20. It is proper to point out that the Steel Company, in its operations, has occasion to use coal for purposes apart from the making of iron and steel. To epitomize the evidence, I think that the use of coal is distributed as nearly as may be as follows: Taking 75,000 tons per month as the consumption there would be used in the coke ovens about 55,000 tons. In the gas producers, for steel making, about 14,000 tons, and this coal must be as free from sulphur as that used for making coke. The remaining 6,000 tons would be used for the boilers and locomotives in the works, the hoisting gear at the loading piers, the use of steamers engaged in bringing the ore from Wabana, in the Wabana ore raising and loading, and in mining the limestone at Marble Mountain. It was for some of these purposes that the Steel Company proposed to use No. 6 Coal.

Shortage in deliveries

21. This arrangement continued for some months and the chief difficulty between the two companies henceforth is the quantity delivered. The Coal Company in 1905-1906, never quite reached the demand of the Steel Company in point of quantity, except in the winter months. According to the notices given, the Steel Company was to have 80,000 tons per month in August, September and October, 1906, and this quantity was not furnished, and the Steel Company were compelled to purchase coal elsewhere at larger figures to efficiently operate their plant.

22. At this point an interpretation of the words of the contract in respect to notices of material increases is necessary. Material increase

Section 5 of the contract requires that the Steel Company shall from time to time, give notice of not less than three months to the Coal Company of its requirements during any coming month. This is proved by the evidence and correspondence to have been steadily done, but the contract also says that if such requirements are at any time materially in excess of the requirements existing at the time such notices are given, then the Coal Company shall use due diligence in preparing to furnish the increased demand, but shall in any event be prepared to furnish the increased demand "within twelve months from the date of such notice." Provision clause 5

I find that on the 30th March, 1905, the Steel Company notified the Coal Company that in consequence of putting into operation a third blast furnace, they would require 80,000 tons in April, 1906. On the 3rd of April, 1905, Mr. Duggan, for the Dominion Coal Company, in a communication addressed to Mr. Cameron, comptroller of the Steel Company, says: Notice of material increase

"I beg to acknowledge receipt of your favor of March 30th, advising me that you expect to put a third furnace into operation towards the close of this year, and notifying us that you will require 80,000 tons in April, 1906. We shall endeavor to meet your increased requirements."

Having given this notice a year in advance of their requirements, I find that on the 30th of April, 1906, the Steel Company gave notice to the Coal Company that their requirements for the month of August would be 80,000 tons, that on the 30th of May, they gave notice that their requirements for September would be 80,000, and on the 26th of June they gave notice that their requirements for the month of October would be 80,000 tons. The coal actually furnished for August by the Coal Company was 58,270 tons, for September 50,525 tons, and for October 62,618 tons and the Steel Company was compelled to purchase over 19,000 tons elsewhere to operate their works. Coal required and furnished

The defendant's counsel urge that I should interpret the words "from the date of such notice," to mean twelve months Interpretation clause 5

from the date designated in such notice, while the plaintiffs' counsel contend that the true interpretation is twelve months from the date such notice is received. I adopt this last interpretation, and consequently there is no alternative but for me to find the Coal Company was in default in its deliveries during the months of August, September and October, 1906, and is liable for damages for such loss as the Steel Company incurred in obtaining coal from other mines at a larger cost.

Default in Aug., Sept. and Oct. 1906

Agreement as to slack etc.

23. But this is a very inconsiderable feature of the issue between the two parties. Under a temporary arrangement between the Companies, the Steel Company to assist the Coal Company in meeting the increased demand, had agreed to accept a portion of the deliveries in slack and banked coal, but the deliveries being still below requirements and the coal furnished by the Coal Company in October, 1906, becoming daily more unsatisfactory, on October 18th, 1906, the manager of the Steel Company, Mr. Jones, sent the following official notice to the manager of the Coal Company:

October 18th, 1906.

Messrs. Dominion Coal Co., Ltd.,
Glace Bay, C.B.

Letter cancelling agreement

Gentlemen,—Since December last, we have been accepting slack coal and banked coal from you. We did this without prejudice to our rights because of the assurances you gave us, through your Mr. Wilson, that by so doing you would give us the quantity of coal we require, notice of which had been given you by us.

We regret that, notwithstanding our accepting slack and banked coal, instead of freshly-mined run-of-mine coal from the Phelan seam, you have not given us the quantity of coal called for by our notices, and we have been compelled to purchase coal elsewhere.

We now notify you that, after October 31st, we will not accept from you any coal but freshly-mined run-of-mine coal from the Phelan seam.

Yours truly,
DOMINION IRON & STEEL CO., LTD.,
(Signed) F. P. JONES,
General Manager.

24. On November 1st the Coal Company began to deliver quantities of coal at the Assembly Yard, with this difference as compared with the former practice. Hitherto each car delivered had on it a card or label indicating the pit from which the coal was taken, as No. 1, No. 3, No. 5, No. 2, No. 4 or No. 6. On November 1st all the cars were labelled simply, "Run-of-Mine, Phelan Seam." The analyst was therefore compelled to analyze nearly all the coal as it arrived, and this showed that a large proportion of this coal was from No. 6 or from No. 4, and was so high in sulphur as to be entirely unfit for the manufacture of iron or steel. Notices were promptly sent to the manager of the Coal Company, rejecting the coal, so excessive in sulphur and ash. It may be remarked here that the experts indicated that excessive ash was also a serious factor in coal used for blast furnaces and diminished in a large degree its economical value in providing a commercial product. As matters were now approaching a serious issue, Mr. Jones gave instructions to the Chief Analyst that all coal should be rejected which contained sulphur in excess of 4 per cent. It must be borne in mind that all coal used for making coke for blast furnace use is washed in the Steel Company's plant and this process eliminates much impurity and diminishes the sulphur. Notice was given, however, that all coal containing an excess of four per cent. sulphur was to be rejected and notices were accordingly sent from day to day up to the 9th of November. Mr. Jones claimed, in some of these notices, that the coal received was not reasonably free from stone and shale. Mr. Duggan, the manager of the Coal Company, acting doubtless under advice, then sent the following letter or notice, which opens up in clear and distinct terms the issue between the parties:—

Refusal to label cars

Rejection of coal

November 9th, 1906.

Messrs. the Dominion Iron & Steel Company, Ltd.,
F. P. Jones, Esq., General Manager,
Sydney, C.B.:

Dear Sirs,—In consequence of your peremptory refusal to accept the coal which we have furnished and have been ready and willing to furnish in accordance with the terms of our contract, dated 20th October, 1903, there is no course left open to us but to accept the necessary consequence of your action in this matter. Your conduct in refusing to accept

Coal Company terminates contract

delivery of the coal furnished and to be furnished constitutes a clear repudiation on your part of your obligation under the contract and renders further performance on our part impossible. We therefore formally notify you that the contract mentioned is at an end.

I greatly regret that your repudiation of a contract, the nature of which has involved the expenditure of millions on our part, and we cannot understand your disregard not only of our contract rights, but of the large interests necessarily affected by your action.

You have also violated the contract by not returning our cars, and by purchasing coal from other parties in violation of the provisions of the contract.

Our cars in the Assembly Yard, loaded with coal furnished under the contract and rejected by you, we will proceed at once to remove.

Yours truly,

DOMINION COAL CO., LTD.,
(Signed) G. H. DUGGAN,
2nd Vice-President.

Effect of Coal Coy's letter

25. This was a notice of termination of the contract on the part of the Coal Company, on the ground that the Steel Company had made a breach by refusing to receive coal tendered in accordance with the terms of the contract. The Steel Company claim that they have made no breach of the contract because the coal tendered after November 1st, 1906, was not coal contemplated by the contract, or in accordance with its spirit and express provisions.

Cars of coal rejected

26. Of the coal rejected by the Steel Company between November last and November 9th, 1906, 153 cars were taken back by the Coal Company, and I have its ultimate distribution before me. But the entire quantity delivered, which exceeded 4 per cent. of sulphur in the analysis, amounted to 264 cars, or 4,347 tons. The Steel Company retained of this sufficient for the purpose of extensive tests. About 1,000 tons were coked, and the coke analyzed and found to be wholly unsuitable for blast furnaces. Samples on an extensive scale, and as I find, in a fair manner, were selected by a representative of McCreath, Pittsburg, from a number of cars in groups

Analysis of coal tendered

of four and analytical tests made, and a number of these samples were forwarded, by express, to McCreath's, of Pennsylvania, experienced and eminent analysts, and the results of the tests proven before me. Briefly the result showed that the average of all groups of coal from No. 6 was: Ash, 15.63, and sulphur, 6.03. Of all coal thus delivered from No. 4, the average of ash was 9.42, sulphur 4.57. The analysis of coal delivered from the Phelan seam in 1905, and the first half of 1906 was, for raw coal, unwashed, an average of about 2.3 sulphur and about 7 per cent. ash. Washed, the average of sulphur was about 1.6 per cent., and ash a little under 5 per cent. Coke produced from this washed coal had an average of 1.4 in sulphur, and a little less than 6 per cent. in ash.

Sample cars retained

Something like 1,000 tons of the coal delivered between November 1st and 9th was placed in a pile in their yard by the Steel Company for personal inspection by experts, and it remained there until the trial. I find, therefore, that the Coal Company delivered during those eight days in November, 1906, over 4,000 tons of coal entirely unfit for metallurgical purposes, and but a very small quantity of which could have been used in that period for other purposes, and the balance delivered, a little over 6,000 tons, while accepted by the Steel Company, was quite insufficient for the purposes of making coke and effectively running the gas producers in their daily operation during that period, and the Steel Company was compelled to close their blast furnaces in the early days of the month.

Findings as to Nov. deliveries

This constitutes, I think, a fair narrative of the proved facts up to the 9th of November, when the defendant company declared the contract at an end. There are a few specific facts in controversy, however, upon which it is necessary I should make a finding before proceeding to apply the law.

Finding. No. 6 on Phelan Seam

1st. The plaintiffs raised the issue that No. 6 was not on the Phelan seam, and it was not on the Phelan seam as understood by the Steel Company when the contract was made. I think the defendants proved that it was on the Phelan seam as conclusively as a purely geological question can be established, and I find that No. 6 and its workings are on the Phelan seam.

Coal was commercial

2nd. The plaintiffs also raised the question that the coal mined at No. 6 was, owing to its excess of ash and sulphur, not commercial coal or fit for any ordinary purpose for which coal is used. The defendant Company, by a great number of witnesses and by many tests, which I regard as conclusive, established that No. 6 coal was fit for steam purposes and capable of being consumed in grates and furnaces. I therefore find that coal from No. 6 pit was commercial coal, though from its greatly larger percentage of ash and sulphur, inferior in general quality to other coal from the Phelan seam mined by the Coal Company.

Coal unfit for making iron and steel

3rd. The defendants hardly contested that the coal from No. 6 mine was wholly unfit for metallurgical purposes, and impossible for use in making iron and steel, under conditions now existing in the world. I find that No. 6 coal was unfit for metallurgical purposes, and could not be used for coke-making or gas producers on their plant. If no other coal could be provided, the plant would have to close.

Not reasonably free from stone and shale

4th. I have now another question of fact to find which is not altogether free from difficulty. Was the coal tendered by the Coal Company, between November 1st and 9th, "reasonably free from stone and shale" as required by the contract? The evidence for the defendants is that all the coal from No. 6 tendered was mined according to the best requirements of mining, and passed over the picking belt, which was of as high a standard at No. 6 as in the case of any coal mines in the Province, and witnesses familiar with the coal trade defined "run-of-mine coal reasonably free from stone and shale," as coal taken from the mine and after passing over the picking belt, put on cars for transportation, and this is what was done with the coal delivered from No. 6. But witnesses for the Steel Company testified that this coal from No. 6 was characterized by laminations or bands of metallic substance, sulphurous in its nature, which ran through it and permeated it in all directions. Those who examined the specimen lot, and those who inspected the rejected car loads declared that on breaking lumps of this coal, these layers of pyritical material could be seen running through it. It was proved, also, by several careful tests, that a carload of this coal weighed eight or ten per cent. more than a carload of coal from the other mines of the

Phelan seam. Experts also testified that the excess of ash and sulphur indicated the presence of foreign matter which would come under the designation of stone and shale. Mr. Poole, an experienced coal authority, and a scientific man, said that the term "stone" was generic and covers all mineral material other than the mineral to be gotten from the mine. Meaning of "Stone"

It was also testified by those who examined the coal and its laminations that no process of picking on the picking belt could possibly eliminate all this matter because it would be more or less concealed in the interior of the lumps of coal. Unfortunately the Coal Company did not produce much evidence to aid me in respect of the actual character of this rejected coal. They proved it had passed the picking belt with eight men on the belt to pick out stone and shale, but they did not produce any witnesses who had examined the lot of coal which the Steel Company had kept in its grounds for inspection. They did produce two witnesses who had passed over the 153 cars of coal taken back by the Coal Company, after rejection. One, Mr. Wanklyn, the vice-president of the Coal Company, did not even go over the cars, but looked at the coal on them, and said it looked all right. The other, Mr. Drummond, walked over the cars and looked at it carefully, and said it seemed to him to be in good condition, and that he did not observe any stone shale in it in excess of what is found in other coals used in Nova Scotia. His only examination, however, was by the eye. On cross-examination, he said he observed sulphur in the coal, possibly to the extent of two or three per cent., and an expert declared that coal which showed three per cent. of sulphur on inspection by the eye, would indicate a larger percentage present. Mr. Drummond also said that he did not, in his inspection, break up any of the lumps for fuller examination. A number of persons who saw the piles of rejected coal in the Steel Company's grounds, declared that it was not reasonably free from stone and shale. In fairness it must be stated that some of those who examined it, saw it only after it had been exposed for some months, which would of course deteriorate its character, but would not, it seems to me, materially affect the quantities of impurities in it. After carefully weighing all the evidence, while I find this coal was carefully mined and picked on the belt, I cannot find under the evidence that it was reasonably free Inspection of the rejected coal

Finding

from stone and shale. I think the weight of evidence is that it was not.

Price of coal

5th. The Coal Company proved, and if the fact has any significance it should appear, that they received a price much larger than $1.24 per ton for run-of-mine coal supplied under a large contract with the Intercolonial Railway at the time the contract with the Steel Company was made.

Knowledge of Coal Company

6th. I need scarcely find that the directors of the Coal Company were fully aware of the purposes for which the coal to be supplied under the contract was to be used, because this appears clearly on the face of the contract.

Output of coal 1906

7th. The output of the Coal Company for 1906 was 3,548,037 tons. The total output from the pits on the Phelan seam other than No. 6 was 2,677,931 tons. The requirement demand of the Steel Company for August, September, October and November, 1906, was 80,000 tons. The production of the Coal Company for those months from mines on the Phelan seam other than No. 6, was for August, 249,367 tons; for September, 239,546 tons; for October, 243,816 tons, and for November, 228,923 tons.

Quantity required by Steel Co.

8th. The weight of evidence seems to be that the Steel Company could have used 80,000 tons in August, September, October and November, 1906. Less was used even with the other coal purchased, but the works were not operated to their full capacity.

Steel works closed

9th. When the Coal Company declared the contract at an end, November 9th, and ceased supplying coal under the contract, the Steel works were temporarily closed until coal could be secured from other places in Nova Scotia at an increased cost. Among the coal secured from other mines in Nova Scotia was some which was as objectionable in point of sulphur percentage as the coal rejected by the Steel Company in November. But this coal was not used for making coke or operating the gas producers. Later, a temporary contract was made between the Steel and Coal Company, pending the determination of this suit, under which the Coal Company furnish selected coal at a price much in excess of the price

Purchases elsewhere

agreed upon in the contract of October 20th, 1903, and the works are in full operation under this arrangement.

Delivery unreasonable if for steam purposes

10th. It was contended on the part of the Coal Company that as a certain quantity of coal for steam producing purposes was required each month by the Steel Company, the supply of a large quantity of coal between November 1st and 9th, fit for such purposes should be taken as a delivery of this quality of coal for the month. I have no difficulty in finding that no such interpretation can be placed on this action. The Steel Company required at that time to use over 2,500 tons per day, more than ninety per cent. of which must be used for coke-making and operating the gas producers. To deliver in a few days all the steam making coal and omit the delivery of coal suitable for metallurgical purposes would be to close the works. The Steel Company has no place to store any such quantity of coal as the Coal Company knew. Such a system of delivery would be contrary to the spirit of the contract and contrary to the steady practice under which the contract had been operated. The delivery of this large quantity of No. 6 coal, between November 1st and 9th, can only be supported on the assumption that the contract does not call for coal suitable for metallurgical purposes.

Variability of seams

11th. The evidence before me made it very plain that coal seams in Nova Scotia, and, indeed, in all parts of the world, vary in quality and coal taken from one part of a seam differs materially, both chemically and otherwise, from coal taken from other parts of the same seam.

Steel Co did n inten cance contrac

12th. The consequence of the action of the Steel Company in rejecting unsuitable coal, between the 1st and 9th November, is a legal question and must ultimately be determined upon legal principles; it is, however, proper that I should say that the action of the Steel Company was clearly with no intention of terminating the contract. The contract was of the greatest possible value to the Steel Company and they have every motive to desire to continue the contract in operation. If the refusal to take unsuitable coal between the 1st and 9th November was clearly a breach of the contract, they must submit to the legal consequences, but certainly the refusal was not made with any desire or intention on the part of the Steel Company to terminate the contract.

Position of National Trust Co.

13th. The contract of October 20th, 1903, was assigned to the National Trust Company, which is trustee of the bondholders of the Steel Company, and notice of this transfer was given to the President of the Coal Company by the National Trust Company, on November 27th, 1903. The object of the assignment, so far as I could form an opinion, was to enable the Trust Company, as trustees for the bondholders, to carry on the operation of the steel plant in case of default made by the Company in paying the interest on the bonds. No default has been made. The National Trust Company are joined with the Steel Company as plaintiffs in this action and it was strenuously urged before me that judgment must be given against one of these plaintiffs, and I was asked to dismiss the action against one of them. I did not feel at liberty to do this. Practically the Steel Company are the plaintiffs in this action, and, being in possession of their property and operating the works without default, they are the parties immediately affected by the alleged breach of contract by the defendants. I think, however, that the National Trust Company had a right to be joined in the action, as hereafter, in case of default, they would be called upon to operate the plant in the interests of the bondholders and would thus have very great interest in having the contract upheld. I also felt that the Trust Company had a right to see that the contract was not broken or impaired by any collusion on the part of the Steel Company with the Coal Company, or by any undue or improper action on the part of the Steel Company itself.

Ratification by legislature

14th. It may be mentioned that all these contracts, including the one under consideration, have been ratified and confirmed by the Legislature of Nova Scotia, by special act. The effect of this legislation, as I conceive it, is to make it impossible for either of the parties to deny the existence or validity of the contract itself. I do not conceive that this legislation would affect the conditions under which a breach of the contract by either of the parties could be made or the consequences which a breach would involve. It may be mentioned, however, that it was contended by the Steel Company that in adopting the policy of confirming this contract by special legislation, the law making power in Nova Scotia had indicated its sense of the importance of the contract from a public point of view, which might perhaps have some bearing upon the conditions

and circumstances under which it could be terminated by either of the parties.

Prior negotiations not evidence

15th. Evidence was tendered to me of what passed between the Steel and Coal Companies in negotiations which led to the contract of October 20th, 1903, and draft contracts submitted by attorneys of both sides were tendered in evidence to show the nature of the negotiations between the parties. I felt that under the English authorities I was bound to refuse to receive this evidence. In the case of *Inglis vs. Buttery* (L. R. 3 A. C. 552), Lord Blackburn places the whole subject so clearly in his very lucid and able judgment in the House of Lords, that I think the matter can remain no longer in doubt that it is not admissible to consider the "communings" of the parties prior to the making of a contract. The contract itself must be taken to embody the ultimate conclusions of the parties. I therefore rejected this evidence, and if I was wrong in this regard, it will be necessary to have fresh evidence taken upon the subject, because if this evidence and the exhibits tendered are admitted, the plaintiffs must necessarily be offered an opportunity for meeting or explaining any inferences that might be drawn from such evidence.

It is proper to mention that I have had the benefit of exceedingly able and exhaustive arguments by Mr. Lovett, K.C., for the Coal Company, and Mr. Nesbitt, K.C., for the Steel Company.

I think I have dealt with the essential facts and it only remains to apply the law.

Argument of Coal Co. on clause 3

The Coal Company contends that the contract defines in definite and explicit terms the quality of coal it is required to deliver, and therefore nothing in the way of implication can be read into it. Cases are cited in support of the doctrine authoritatively established by the English courts, that when the parties to a contract have fixed and declared in express terms the matters and things to be performed, then it is not proper to go outside the ordinary grammatical sense of the words used. Hence they say that the contract now under consideration in clause 3 has explicitly defined the class of coal which they are required to furnish, namely, "freshly-mined run-of-mine coal, reasonably free from stone and shale,

and from such seams as may be designated by the Steel Company." As the seam so designated by the Steel Company was the Phelan seam, the Coal Company literally and exactly complied with the conditions between November 1st and 9th, by supplying freshly-mined run-of-mine coal from the Phelan seam reasonably free from stone and shale.

Argument from low price

They argue that the price under the contract is low, and it cannot be inferred that the Coal Company was to assume the risk of suitability. Put concisely, the Coal Company contends that, provided they have complied with the literal terms of clause 3 of the contract, they are not concerned whether the coal delivered is fit for metallurgical purposes or not.

Principle of interpretation

Apart from the fact that I have not been able to find the coal delivered between November 1st and 9th, and rejected by the Steel Company, was reasonably free from stone and shale, I cannot accept as a sound legal proposition the contention of the Coal Company that the bald words of the contract govern. As I read the English decisions on contracts, I think a broader view has been adopted in interpretation. In giving effect to a contract, written or oral, the Court looks at the situation of the contracting parties, in order to give a rational interpretation of the real object aimed at. In the words of Bowen, L. J., *The Moorcock*, L. R., 14 P. D. 68, the object of the courts is "to give efficiency to the transaction and to prevent such a failure of consideration as cannot have been in the contemplation of the parties."

Coal was to operate Steel plant

Here we have a steel company, operating a large plant, entering into a contract with an adjacent coal company, not for the mere purchase of coal as coal, but for the purchase of coal for operating an iron and steel-making plant. The first clause in the contract: "The said Coal Company, from its mines in Cape Breton Co., other than those lying north and west of Sydney Harbor will supply . . . all the coal that Steel Company may require for use in its works as hereinafter described—namely, the blast furnaces, the coking ovens, the steel furnaces, the rolling mills, incidentally gas producers, kilns, ovens, foundries, etc., mines and quarries, steam vessels of Steel Company operated for its own requirements. . . . switching engines at its mines and quarries, etc."

This I regard as the basis of the contract, namely, the purchase of coal to operate a steel plant and its accessories.

Mode of delivery

The second clause which provides for delivery, has perhaps no very great bearing on the issue, except that in providing for delivery it declares that the coal intended "for use in the works of the Steel Company shall be delivered in cars on sidings where required by the Steel Company, connected with the main line of railway of the Coal Company"; and it provides likewise that "bunker coal and coal for mines and quarries elsewhere than Sydney shall be delivered to the Steel Company at any shipping pier," etc. It seems to me a reasonable inference that the parties understood that a part of the coal, and the largest part, was intended for use in the works of the Steel Company.

Kind of coal

The third clause defines the kind of coal to be furnished, a sort of specification which must always be read, it seems to me, in connection with the object of the contract as defined in clause 1. It also seems to me to come exactly within the rule laid down by the Ld. Ch. J. in *Ogden vs. Nelson*, 1903, 2 K. B. 297. "Where parties have a contract, which contains a variety of stipulations and is silent as to others, no stipulation or agreement which is not expressed shall be implied unless it is necessary to give the transaction the efficacy which both parties must have intended."

Intention of parties

In this case, it is clear to me, that the exact and only thing the parties intended was that coal should be furnished to operate an iron and steel plant. I think also the express provisions of clause 3 come strictly and easily within the doctrine laid down by Lord Herschell, in *Drummond vs. Van Inghen*, 12 A. C. 284. He adopts the language of Willes J. in a former case. "The doctrine that an express provision excludes implication, does not affect the case in which the express provision appears on the true construction of the contract to have been superadded for the benefit of the buyer."

Effect of clause 3

It appears to me clear that the heart of the contract, or to use the words of an eminent English judge, "the spirit that breathes through the contract," is coal for iron and steel-making. The specification in clause 3, seems to have been

added for the benefit of the buyer, and it seems to me to read in effect as follows: "You are to furnish me with coal to make steel and iron and run my plant. The supreme factor of this is the absence of sulphur and ash and, therefore, to guarantee me against inferior deliveries for this purpose, you must give me freshly-mined coal, not banked coal, run-of-mine coal, not slack coal, reasonably free from stone and shale, and from such seams as I may think are best adapted for such iron-making."

Coal must still be fit

But to say that because these specifications are added for the benefit of the buyer they dispense with the need of furnishing coal suitable for operating the iron and steel plant, seems to me to be the exact antithesis of what Bowen, L. J., has declared the objects of courts, namely: "To give efficacy to the transaction and prevent such a failure of consideration as cannot have been in the contemplation of the parties." The parties here contemplated and have expressly said so, that the contract was a coaling contract for a steel plant. Would it be rational to hold that the specifications of clause 3 are to be interpreted as destroying the primary object of the contract and permitting the Coal Company to furnish, by a literal adherence to the specifications, coal which will not make iron or steel?

Chanter vs Hopkins

The Coal Company claim that the doctrine of *Chanter vs. Hopkins*, 4 M. & W., 399, applies because there is a specific definition of quality which excludes all variation. In this case the defendant ordered a smoke-consuming furnace for use in his brewery. The plaintiff sent him one, the only smoke-consuming furnace available at that time, and although it proved of no value, the Court held defendant would have to pay for it. But in that case, Lord Abinger says: "If the terms of the contract were proposed by the plaintiff himself, such as, 'I will send you one of my smoke-consuming furnaces which shall suit your brewery,' in such case it would be a warranty that it would suit the brewery." Baron Parke, in another case, illustrated the difference between the specific and the case where there was range of choice. He said: "If I go to a man and say to him, 'I want you to send me a riding-horse from your stable,' and he has several horses, he is bound to see that I get what I want, namely, a riding-horse, and one

that is suitable; but if I go to the same man and say, 'I want the bay horse from the third stall for riding,' I am bound to take it."

Right of selection

Applying the doctrine of these two cases, it seems to me that the provisions of this contract do not imply a specific limitation, but leave a complete range of choice. Here is a contract to supply coal for a particular purpose, namely, operating a steel plant. It must be freshly-mined and run-of-mine. It must be reasonably free from stone and shale, and it must be from the Phelan seam, but it must also be fit for steel-making. "You must give me coal to operate my steel works and you must give it from a certain seam, and prepared in a certain way, but it must be coal for making steel. Whenever you can get such coal out of the Phelan seam, it must be furnished me. If some coal in the Phelan seam will make steel and some will not, then, as our contract is for coal to operate our works, you must furnish from the Phelan seam coal which will operate my works."

I cannot see any other interpretation which will fulfil L. J. Bowen's supreme definition that the object of the courts is "to give efficacy to the transaction and prevent such a failure of consideration as cannot have been within the contemplation of the parties."

Steel Co. must buy from Coal Co.

The fourth clause provides that so long as the Coal Company should be willing and ready to supply coal for the Steel Company, all coal required by the latter should be purchased from the Coal Company to the amounts agreed to be supplied. This plainly means that the Steel Company is to purchase exclusively from the Coal Company so long as the latter is ready to supply it.

Steel Co. cannot sell the coal

Clause 9 provides that the Steel Company shall not sell or transfer to any person or corporation any of the coal delivered to it under this agreement, except with the consent in writing of the Coal Company, unless the Coal Company refuses to repurchase the coal at the price of $1.00 per ton on said sidings. I interpret this to mean that unless with the consent of the Coal Company, the Steel Company cannot sell a ton of coal purchased from the Coal Company.

Reasons from use and limitations

Here we find a company manufacturing iron and steel on a large scale, seeking coal to operate their plant. We find a coal company, knowing this object, which appears plainly on every page of the contract, undertaking to furnish them with coal. Can it be possibly held that this contract, in any aspect, is fulfilled by furnishing coal wholly unfit for making iron or steel? Under the terms of the contract the Steel Company is not permitted to purchase coal from any other company, and is not permitted to sell a pound of coal so obtained to any person except to the Coal Company at $1.00 a ton. Can a court say that this contract means that the Coal Company can deliver to the Steel Company coal from No. 6 mine to the full extent of the demands of the contract from which they could not smelt a pound of iron or make a pound of steel, could not sell a ton of such coal, nor purchase from another company a ton of coal at a higher rate? Would such an interpretation "give efficacy to the transaction," or would it "result in such a failure of consideration as cannot have been in the contemplation of the parties"?

Reasons from agreement in clause 3 as to slack

The contract itself contains many provisions which seem to me to conclusively negative any such literal interpretation as would nullify its obvious intention. Provision is made in the contract that after four years the Coal Company should be at liberty to furnish slack coal instead of run-of-mine, but this is accompanied with a proviso that it should be "suitable" for steel-making and to make the matter absolutely clear "suitable" is defined in the following terms: "The slack coal so supplied, when properly washed by the Steel Company shall not contain a per centum of impurities, to wit: ash and sulphur appreciably greater than the per centum of impurities in the same coal of run-of-mine grade when crushed and washed in the same manner."

What meaning must I give to the requirement that this slack shall not contain a percentage of ash and sulphur appreciably greater than in the same coal of run-of-mine grade when crushed and washed in the same manner *for use in steel and coke-making, and for blast furnace coke*? Do not these words underscored plainly intimate that "making steel and coke for blast furnaces" was the primary and supreme object of the contract? Can it be rationally held that, while the Coal Company, if they furnish slack, must have it so free from ash and

sulphur that it can be used for iron or steel-making, and equal in this regard to run-of-mine coal, but that run-of-mine coal, to which it must be equal, need not be fit for metallurgical purposes?

Reasons from agreement to wash coal

Again, under the terms of the contract the Steel Company is to erect and operate a coal washing plant, the object being to eliminate a portion of the impurities in the coal as it comes from the mine. Can I reasonably hold that the Steel Company is called to bear the expense of washing coal, which no washing plant would be effective to remove the impurities and make it coal fit for metallurgical purposes?

If all coal from No. 6

If the mere furnishing of run-of-mine coal from the Phelan seam which has passed the picking belt is a fulfilment of the contract then all the coal can be furnished from No. 6, and no operation of the works is possible.

If coal changes and fulfillment impossible

On behalf of the Coal Company, it was contended that the coal from the Phelan seam might either deteriorate below the conditions of metallurgical coal, or that part of it which is metallurgical might become exhausted, in which case an onerous burden would be imposed upon the Coal Company. What relief the courts would be able to give in either of these contingencies happening, I am not called upon at this time to say. But no such contingencies have happened, or are in sight.

Production of coal in Nov. 1906

During November, 1906, the Coal Company produced from the mines on the Phelan seam other than No. 6, 228,000 tons, and although some part of the output of No. 4 might have been unsuitable for making coke, this would not, I judge, have been greater than was necessary for steam purposes. The demands of the Steel Company was for 80,000 tons, leaving a surplus for commercial sales of 148,000. It was urged by the Coal Company that to have supplied from those mines the full requirements of the Steel Company would have unduly diminished their sales to other parties at more remunerative prices. I have no doubt this is the fact. But I do not consider that I am at liberty to consider this in giving effect to the contract. The parties made their bargain. The Coal Company agreed to furnish coal up to the requirements of the blast furnaces,

Better price elsewhere, no answer

suitable, as I conceive, for the requirements of iron and steel-making. They had the coal available for this purpose. They refused to furnish it and delivered instead coal absolutely unsuitable for iron and steel-making. Am I to say it is an answer to this breach that they could make more money by selling to some other persons?

English authorities

I may incidentally refer to a number of English cases which bear more or less directly on the point at issue, although I conceive that the case rests in the end upon the large principle of interpretation of contracts to which I have referred already, but a number of English cases appear in which the broad interpretation of contracts has been upheld, which have some bearing on the point.

Jones vs Bright

The earliest is *Jones vs. Bright*, 5 Bingham, 533. The plaintiff purchased from the warehouse of defendant, copper for sheathing a ship. Defendant knew the purpose for which it was to be used, and said: "I will supply you well." Copper had some defect, the nature of which was not proved, and only lasted four months, average duration four years. Held plaintiff entitled to recover damages for the breach. Best, C.J., "If a man sells an article, he thereby warrants that it is merchantable, that it is for some purpose. If he sells it for a particular purpose, he thereby warrants it fit for that purpose."

Mody vs Gregson

Mody vs. Gregson, L. R., 4 Ex. 49. This was a sale of gray shirtings, according to sample, each piece to weigh seven pounds. Goods accepted according to sample and of the correct weight, but afterwards discovered that the weight was made up of china clay. Held that the selling by sample included only that part of the warranty which could be judged by the sample. The remarks of Willes, J., in giving judgment in this case, seemed to me to have a great significance as applied to the facts of the case under consideration. He says: "The rule of law entitling a purchaser in an ordinary commercial bargain for a supply of goods, not specific or agreed upon at the time, but described generally as of a designated sort, to receive merchantable goods of that sort, is founded upon the obvious inference, from the character of the transaction, that the parties are dealing not for the mere semblance or shadow of the thing designated, but for the thing itself, as

commonly understood in commerce with the essential qualities which make it worth buying to a person who wants an article of that description."

Drummond vs. Van Inghen, 12 A. C. 284. In this case cloth was sold by sample for coatings, purpose known to seller. Cloth delivered equal to sample in weight and defects existed in sample, but were latent. Held not in compliance with contract. The case was taken to the House of Lords and Lord McNaughton, in his judgment uses these words: "A manufacturer who agrees to supply goods to order, knowing the purpose for which they are required, thereby impliedly undertakes to supply goods fit for the purpose in view." Drummond vs Van Inghen

In *Jones vs. Just*, 3 Q.B. 197, Mellor, J., says: "In every contract to supply goods of a specified description, the goods must not only in fact answer to the specified description, but must also be saleable or merchantable under that description." Jones vs Just

Waller vs. Schillizzi, 17 C. B. 618: A. bought of B. Calcutta linseed tale quale. Held contract not satisfied by delivering linseed coming from Calcutta, which contained so large a mixture of other inferior seeds as to lose the distinctive character of Calcutta linseed. Waller vs Schillizzi

Applying these words to this case, it seems to me that the contract is not satisfied by supplying coal from the Phelan seam freshly-mined, etc., which contains so large a percentage of sulphur and ash as to lose the distinctive character of metallurgical coal.

Inglis vs. Buttery, 3 A. C. 552: In this case the party agreed to make repairs on a ship according to specifications which fully set forth the class of repairs intended to be made, and the contract generally dealt with repairs. The contractor did some new work, and claimed it should be paid for extra. But the contract declared that the object of the repairs and changes was to obtain for the ship registration at Lloyds as A1. and the new work was necessary for this purpose. The court held that this was the essential feature of the contract, and as the contractor had agreed to put the ship in condition to be registered A1. at Lloyds, every- Inglis vs Buttery

thing necessary for this, the supreme object of the contract, must be done.

Contract Express Coal to be suitable

I think, as a matter of law, that the contract of October 20th, on its face, is a contract to supply coal to the Steel Company for the purpose of operating an iron and steel plant. I do not have to read into it any implications. I have only to make the necessary and inevitable deduction that coal to operate an iron and steel plant, must be coal with which such a plant can be operated, for the object and purpose of the coal contracted for is expressly stated in the contract. Between November 1st and 9th, the Coal Company furnished in large quantities coal not reasonably free from stone and shale, and incapable of operating an iron and steel plant, and while they were mining plenty of coal fit for such purpose, they failed to furnish sufficient quantity of such coal to meet the requirements of the contract. The Coal Company thereby committed a breach of the contract, and are responsible to the Steel Company for all the loss and damage which result from this breach. I think the Steel Company was justified in refusing to take in large quantities of the unsuitable coal furnished by the Coal Company between November 1st and November 9th, and that such refusal did not constitute a breach of the contract, and I think the contract is in full force.

Breach by Coal Co.

AS TO REMEDIES.

Remedies Assessment of damages

1. As to the failure to supply sufficient coal during August, September and October, I think a referee should be appointed who should ascertain how much coal it was necessary for the Steel Company to purchase in those three months to operate their works, and the cost of such coal delivered at their works, and the difference between such cost and the contract price, $1.24, should be paid by the Coal Company to the Steel Company.

The referee should also enquire into the question of any damages which the Steel Company sustained by reason of non-delivery of sufficient coal in August, September and October, apart from the additional cost of coal.

2. The referee should also enquire into the cost of coal obtained by the Steel Company, since November 1st, over and above the contract price, $1.24, and all sums paid in excess

of $1.24 should be repaid by the Coal Company to the Steel Company.

3. In November, in consequence of the failure of the Coal Company to deliver to the Steel Company sufficient coal suitable for the operation of its works, the works were suspended. The referee should ascertain the actual loss and damage which the Steel Company sustained by this temporary suspension of work.

Contract still in force

I think the contract of October 20th, 1903, is still in operation, and in my judgment the best, indeed, the only true remedy in this case, is the issuing of a decree requiring the Coal Company to perform the terms of the agreement. I am not unaware of the difficulties which such a course might possibly involve, but I think the court has ample power to enforce such a decree by the appointment of a receiver, if any attempt was made to evade performance. To award damages for a period so long as the term during which this contract is to be in force, seems to me an undesirable remedy from every point of view.

Receiver may be appointed

Order

I, therefore, direct that after the damages sustained up to the date of the reference are determined by the referee, an order pass, requiring the Coal Company to pay such damages and thereafter to specifically carry out the terms of the contract according to the true tenor thereof.

September 16th, 1907.